No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,

Appellant,

vs.

FULGENCIA D. CADIENTE,

Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLANT.

THOMAS M. WADDOUPS,
ROBERT E. BROWN,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Proctors for Appellant.

ROBERTSON, CASTLE & ANTHONY,
312 Castle & Cooke Building, Honolulu 1, Hawaii,
Of Counsel.

Subject Index

Table of Authorities Cited

Miscellaneous

No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLANT.

OPINION BELOW.

The opinion of the District Court appears in the record at pages 13-23.

JURISDICTION.

This suit in admiralty to recover on a policy of marine insurance for the alleged constructive total loss of the insured vessel was commenced by the filing of a libel *in personam* in (R. 2-8), and issuance of monition from (R. 10-11), the United States District Court for the District of Hawaii against appellant. It involves matters within

the admiralty and maritime jurisdiction of said District Court. 28 U.S.C. Section 1333. A final decree was entered against appellant by said District Court on April 25, 1950 (R. 24-25), and appellant filed notice of appeal on May 5, 1950 (R. 27-28) in compliance with 28 U.S.C. Section 2107.

The jurisdiction of this Court of an appeal from the final decision of said District Court is conferred by 28 U.S.C. Sections 1291, 1294 and 41.

STATEMENT OF THE CASE.

Appellant, The Indemnity Marine Assurance Company, Limited, is an English corporation engaged in underwriting certain risks in the Territory of Hawaii through its general agent, The Bonding and Insurance Agency, Limited, a Hawaiian corporation. Both principal and agent will be referred to herein as the appellant except in connection with dealings *inter se.*

Fulgencia D. Cadiente, the appellee, is a citizen of the United States and was the registered owner of the sampan MISS PHILIPPINE at the time of the alleged loss (R. 44, 88). Her husband, Delesforo B. Cadiente, acted as her agent in all matters concerning the vessel (R. 91, 165). For simplicity's sake, both wife and husband will be termed the appellee herein.

In order to obtain a loan from the Bank of Hawaii secured by mortgage of the vessel, the appellee procured this policy from appellant insuring the vessel against the risk of total or constructive total loss only during one year from December 8, 1948 (R. 6, 46, 90).

MISS PHILIPPINE stranded on the rocky shore at Kaupo, Maui, on the morning of June 6, 1949 (R. 72). Her master notified the Coast Guard promptly of this incident; and that service relayed notice of the stranding to the appellee and dispatched a boat to the scene, where it was told that it could do nothing (R. 73, 76, 91). The master ordered his crew off the sampan and they remained on the nearby beach for several days awaiting instructions from the appellee (R. 77).

On the following day, Tuesday June 7th, the appellee flew to Maui and inspected the vessel in her stranded position at Kaupo (R. 92, 166). Having already been approached by Charles P. Hagood, master of the tug MAIZIE-C operated by King Limited, concerning the job of salvage, the appellee had taken Captain Hagood to Maui at his expense and directed to ascertain the feasibility of salvaging the vessel (R. 47, 62, 115). Captain Hagood chartered a small plane and, from a low altitude above MISS PHILIPPINE, studied the vessel's situation and satisfied himself that he could get her off into deep water with his tug (R. 63). After landing nearby he conferred with the appellee, who authorized him to proceed with the salvage operation; and he returned to Honolulu the same day to commence that job (R. 64, 117, 167).

Meanwhile, having learned of the stranding, the appellant engaged Mr. Frank H. Gallagher, a marine surveyor for the American Bureau of Shipping, to conduct a survey of the stranded sampan (R. 123-125). Mr. Gallagher first attended the vessel late in the afternoon of June 7th and found certain limited damage which he reported to appellant (R. 126-128). Upon the basis of these observed

conditions evaluated against his background of professional experience, he concluded that the vessel was completely salvageable—that she could be removed from the rocks and was worth the cost of repair (R. 129, 136). Appellant thereupon made written demand upon the appellee to proceed with salvage of the vessel in accordance with conditions of the policy (R. 111).

On Wednesday, June 8th, the appellee again examined the vessel and reached the opinion that he and his crew could not salvage her themselves because they had no equipment available; and he then sent the crew home and, through the Coast Guard, notified Captain Hagood not to come to Maui (R. 92-93, 108-109, 167-168). That afternoon the appellee returned to Honolulu and on the next morning, June 9th, personally confirmed to Captain Hagood his concellation of the salvage operation (R. 64, 176).

King Limited then approached appellant for the salvage job, representing that it could be done for $1500, and appellant's Honolulu agent secured from its mainland office the requisite authorization to expend that sum for salvage (R. 160). Appellant and King Limited entered an agreement whereby the latter, using its tug MAIZIE-C, was to undertake salvage of the stranded vessel at Kaupo under the direction of Mr. Gallagher as appellant's agent at that point; and appellant agreed to pay an hourly rate for the tug's services, with the express limitation of $1500 upon appellant's liability for salvage operations unless, when that sum was exhausted, appellant should authorize further expenditure (R. 156-158, 190). On Saturday, June 11th, a formal "charter party" embodying this agreement was executed (R. 79-83).

The tug MAIZIE-C set out from Honolulu on June 10, 1949, and arrived at Kaupo the next morning, Saturday (R. 50). Captain Hagood examined the stranded vessel, both from outside and aboard, and satisfied himself that he could pull her off the beach safely and tow her successfully (R. 51, 66). When Mr. Gallagher inspected the vessel that same day he found that racking due to motion of the surf had increased by about twenty per cent the damage observed on his previous attendance but that the sampan was still salvageable (R. 131). Through the joint efforts of the MAIZIE-C and a bulldozer and crew of men engaged by Mr. Gallagher, MISS PHILIPPINE was drawn off the rocks and floated into deep water on Sunday afternoon, June 12th (R. 52, 130).

Shortly thereafter the vessel capsized because the shifting of air-filled flotation bags placed inside her hull by Captain Hagood had raised her center of gravity too high for lateral stability (R. 66-67).

Although the charter party contemplated towing the sampan to Honolulu, Captain Hagood had been instructed by his company to deliver her into the nearest safe port, and to this end he had already arranged to put her in dry-dock at Kahului, Maui; but rather than risk losing his capsized tow in the rougher water of windward Maui, he proceeded down the leeward (south-west) coast toward Kaunakakai, Molokai, where she could be lifted out of the water for repairs (R. 53-56). The $1500 limit set by the charter party was reached when the tow was abeam Lahaina, Maui, but Captain Hagood considered the vessel valuable and continued towing her to the nearest safe port in the interests of whoever was then her owner (R.

68-70). Accordingly he moored her at Kaunakakai wharf early on the morning of June 14th, in no danger of further damage from wind or weather, and returned to Honolulu with the MAIZIE-C (R. 54).

Meanwhile on Monday morning, June 13th, the appellee told appellant that she was abandoning MISS PHILIPPINE (R. 175-176, 189, 192, 195-196); and the appellee having been advised to seek independent counsel, this notice was confirmed by her attorney later the same day (R. 198-199). At a meeting of the parties that morning of June 13th, King Limited made known that the vessel was then under tow on the high seas, advised that the funds invested in salvage by appellant had been exhausted, and requested further salvaging instructions; and appellant then made clear that it still looked to the appellee to salvage the vessel (R. 188-194). A subsequent meeting was held the same day, attended by appellee's attorney, at which King Limited reported the vessel's position, and appellant stated it had no further instructions for the salvor (R. 195).

Mr. Gallagher again examined the vessel in her capsized position at Kaunakakai on June 14th, accompanied by a representative of appellant, and with the aid of a crane had her rotated in the water and brought to an upright, buoyant position at the pier, where she was tied and left (R. 150-153, 160). Considering her condition at that point, he was of the opinion that MISS PHILIPPINE could have been towed to Honolulu and repaired for about $7,700 (R. 135-136).

By letter dated June 14, 1949, the appellee's attorney served formal notice of abandonment upon appellant and

demanded payment under the policy for a total loss (R. 103, 155). Appellant denied promptly and categorically that the vessel was a constructive total loss and that it had any responsibility for her disposition, advising further that the vessel was then tied safely at Kaunakakai pier and available to the appellee (R. 104-105). Neither party having asserted ownership and King Limited having relinquished any right it may have had to the vessel as salvor, she now rests in the possession of one Yamamoto at Kaunakakai (R. 57, 84, 87).

QUESTIONS PRESENTED.

I. Was the insured sampan MISS PHILIPPINE a constructive total loss within the scope of the insurance policy sued upon when the appellee tendered her abandonment?

II. Does failure of the appellee to perform her duty to act for the defense, safeguard and recovery of the insured vessel bar her recovery upon the insurance policy?

III. Did acts of appellant in recovering, saving and preserving the insured vessel constitute acceptance of abandonment or waive the defects in that abandonment by the appellee?

SPECIFICATION OF ERRORS.

The District Court erred in finding:

1. That on June 8, 1949, parts of the vessel's keel were carried away (R. 32);

2. That libelant-appellee decided on June 8, 1949, to abandon the vessel (R. 32);

3. That Mr. Cadiente asked the Coast Guard on June 8, 1949, to notify respondent-appellant of abandonment (R. 32);

4. That Mr. Cadiente told Captain Hagood on June 9, 1949, that he had abandoned the vessel (R. 33);

5. That after discussion with the vessel's builder on June 9, 1949, libelant-appellee was confirmed in the judgment and decision to abandon her (R. 33);

6. That libelant-appellee on June 10, 1949, told respondent-appellant and its attorney that she had abandoned the vessel (R. 33);

7. That respondent-appellant's attorney on June 10, 1949, told Mr. Cadiente to come back and bring his wife on June 13, 1949 (R. 34);

8. That before leaving Kaunakakai on June 14, 1949, Captain Hagood told Yamamoto that he could have the vessel if he moved it away from the wharf (R. 34);

9. That Captain Hagood testified that he would not have accepted the wreck as a gift (R. 35);

10. That the vessel's sponsons were crushed by respondent-appellant in righting the vessel at Kaunakakai Wharf (R. 35);

11. That neither party replied to a letter of King, Limited, dated July 16, 1949, stating that company's intention to cannibalize and destroy the vessel (R. 35);

12. That respondent-appellant questioned the right of libelant-appellee to refuse to take over the vessel at Kaunakakai (R. 35);

13. That respondent-appellant undertook to salvage the vessel after receiving notice of abandonment (R. 36);

14. That respondent-appellant abandoned the vessel at sea (R. 36).

15. The District Court erred in failing to conclude that the vessel, in either her stranded position or her righted position at Kaunakakai wharf on June 14th, could in all human probability have been recovered and repaired at a cost not exceeding $21,000 (R. 37).

16. The District Court erred in failing to conclude that at the time of abandonment the vessel was not a constructive total loss within the terms of the policy and that libelant-appellee had no right to abandon her and claim for a constructive total loss (R. 38).

17. The District Court erred in entering its final decree herein (R. 31).

18. The District Court erred in entering its "Findings as Gleaned and Construed From Evidence" (R. 31).

19. The District Court erred in finding that neither libelant-appellee nor her husband ever saw the policy sued upon or addendum thereto and were given no opportunity to read the same (R. 31).

20. The District Court erred in failing to conclude that under the policy sued upon no recovery could be had for constructive total loss of the vessel unless the expense of recovery and repairing the vessel exceeded $21,000 (R. 37).

21. The District Court erred in concluding that libelant-appellee was justified in abandoning the vessel and in

failing to conclude and decide that she abandoned without proper foundation that expense of recovering and repairing the vessel would exceed $21,000 (R. 37).

22. The District Court erred in failing to conclude that the policy sued upon required libelant-appellee to labor for the defense, safeguard and recovery of the vessel (R. 38).

23. The District Court erred in failing to find that libelant-appellee failed to make any reasonable, proper and practicable effort to save and conserve the vessel and in failing to conclude that such failure operated to bar her recovery for constructive total loss (R. 38).

24. The District Court erred in concluding that on June 14, 1949, respondent-appellant had no right to protect the vessel (R. 36).

25. The District Court erred in failing to conclude that the policy provided that no act of respondent-appellant in recovering, saving or preserving the vessel should be considered as an acceptance of abandonment and that the acts of respondent-appellant in procuring the salvage and recovery of the vessel did not constitute a constructive acceptance of abandonment (R. 39).

26. The District Court erred in concluding that libelant-appellee was entitled to recover upon the policy for constructive total loss of the vessel (R. 39).

SUMMARY OF ARGUMENT.

When the appellee gave notice of her abandonment to appellant, MISS PHILIPPINE was not a constructive total loss, which could arise only if the expense of recovering and repairing the vessel exceeded $21,000. The appellee did not introduce any evidence which would tend to show such expense, and the testimony of her own expert witness who actually salvaged the vessel disproved her claim that salvage was impracticable. Uncontradicted evidence adduced by appellant established the cost of recovering and repairing the vessel at somewwhat less than one-half of the sum stipulated in the policy as necessary to constitute a constructive total loss. The District Court could only support its conclusion that the appellee was entitled to abandon the vessel and recover on the policy by rejecting both the terms of the policy and general rules of law, by misstating undisputed facts and ignoring others, by relying upon irrelevant testimony for irrelevant findings, and by accepting without reservation the appellee's inexpert opinion despite its conflict with the opinion of qualified experts offered by both parties.

The appellee had an affirmative duty to act for the defense, safeguard and recovery of the insured vessel and failed to make the slightest effort to perform that duty, apparently content to await the vessel's eventual destruction on the rocks and surf.

No act of appellant in recovering, saving and preserving the vessel, undertaken after the appellee had failed to respond to its demand for salvage, can be construed as implied acceptance of the abandonment. Express provisions of the insurance policy granted to appellant the right

to so act without the risk of such conduct being considered an acceptance of abandonment; and such provisions, which protect all parties to insurance contracts and promote the public interest, should be given effect. In any event, the salvage of MISS PHILIPPINE was undertaken and effected successfully before the appellee tendered her abandonment to appellant, and appellant consistently refused to recognize any right to abandon.

ARGUMENT.

I. THE INSURED VESSEL WAS NOT A CONSTRUCTIVE TOTAL LOSS WHEN APPELLEE TENDERED HER ABANDONMENT.

A. CONSTRUCTIVE TOTAL LOSS ARISES ONLY WHEN EXPENSE OF RECOVERING AND REPAIRING THE VESSEL EXCEEDS $21,000.

As her sole ground for recovery, appellee alleged that the stranded vessel "did become a constructive total loss within the meaning and coverage of said marine insurance policy," which allegation appellant denied (R. 3, 12). This pleading placed squarely in issue the existence of a constructive total loss. With blithe disregard of the controlling terms of the insurance policy and established rules of law, the District Court concluded that appellee was justified in abandoning the vessel and held appellant liable upon the policy for a constructive total loss (R. 23). While many errors of fact and law inherent in this ruling will be treated subsequently, appellant has assigned specific error in this regard as follows:

16. That the District Court erred in entering its "Findings as Gleaned and Construed From Evidence."

19. That the District Court erred in finding that neither libelant-appellee nor her husband ever saw the policy sued upon or addendum thereto and were given no opportunity to read the same.

20. That the District Court erred in failing to conclude that under the policy sued upon no recovery could be had for constructive total loss of the vessel unless the expense of recovery and repairing the vessel exceeded $21,000.

21. That the District Court erred in concluding that libelant-appellee was justified in abandoning the vessel and in failing to conclude and decide that she abandoned without proper foundation that expense of recovering and repairing the vessel would exceed $21,000.

Quantum of Damage Necessary.

The doctrine of abandonment for constructive total loss, as distinguished from complete destruction or other irretrievable loss of property, is both ancient and well-established in the law of marine insurance.[1] In such a case the law deems the subject matter of insurance, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects it to be treated as lost.[2] It is a constructive total loss if the thing insured

---

[1] *Marcardier v. Chesapeake Insurance Co.*, 8 Cranch 39 (U.S. 1814);
Marshall v. Delaware Insurance Co., 4 Cranch 202 (U.S. 1808);
Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch 29 (U.S. 1807);
See 2 *Arnold, Marine Insurance and Average*, Sec. 1091 (10th ed. 1921).

[2] *See Peele v. Merchants' Ins. Co.*, 19 Fed. Cas. No. 10,905, at 112 (C.C.Mass. 1822).

is lost for any beneficial purpose to the owner, who may then by seasonable tender abandon it to the underwriter and claim as for total loss.[3]

Under the settled common law of this country, a constructive total loss justifying abandonment exists where the damage sustained by the insured property—in the case of a vessel, the expense of repairing her—exceeds fifty per cent of its agreed or repaired value.[4] As early as 1822 one distinguished federal jurist stated:[5]

> . . . it is so well established by the general current of authority that it may be considered as a fixed rule, that if the ship be injured by perils insured against, so as to require repairs to the extent of more than half her value, the insured is entitled to abandon as for a total loss.

The English rule differs in requiring the cost of salvage and repairs to exceed the full value of the vessel in order

---

[3] *Standard Marine Ins. Co. v. Nome Beach L. & T. Co.*, 133 Fed. 636 (C.C.A. 9th 1904);
Bullard v. Roger Williams Ins. Co., 4 Fed. Cas. 643, No. 2,122 (C.C.R.I. 1852);
See 3 *Kent Comm.* *318.

[4] *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, 179 U.S. 1 (1900);
Oriental Insurance Co. v. Adams, 123 U.S. 67 (1887);
Patapsco Insurance Co. v. Southgate, 5 Peters 604 (U.S. 1831);
Jeffcott v. Aetna Ins. Co., 129 F. (2d) 582 (C.C.A. 2d 1942);
Royal Exch. Assur. v. Graham & Morton Transp. Co., 166 Fed. 32 (C.C.A. 7th 1908);
St. Paul Fire & Marine Ins. Co. v. Beacham, 128 Md. 414, 97 Atl. 708 (1916);
See 6 *Appleman, Insurance Law and Practice*, Sec. 3704 *et seq.* (1942).

[5] Mr. Justice Story in *Peele v. Merchants' Ins. Co.*, *supra* note 2, at 113.

to constitute a constructive total loss.[6] In both England and America, however, it is clear that the policy of insurance itself may effectively limit the right to abandon and claim a constructive total loss by providing that the expense of repairs shall exceed a specified value, and such contractual provisions govern the assured's right of recovery for constructive total loss.[7]

This Court has itself said with respect to a claim for constructive total loss under a policy of marine insurance:[8]

> Every case depends upon its own particular facts, and upon the terms and provisions of the particular policy of the insurance in question.

Again, concerning limitations upon the assured's right to abandon, it stated:[9]

> Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply to other and different kinds of contracts.

And further, carrying this elementary principle to its logical end:[10]

---

[6] *Marine Insurance Act of 1906* (6 Edw. VII ch. 41), Sec. 60. *See Heebner v. Eagle Ins. Co.*, 76 Mass. 131, 69 Am. Dec. 308 (1857).

[7] *Wallace v. Thames & Mersey Ins. Co.*, 22 Fed. 66 (C.C.E.D. Mich. 1884);
Bullard v. Roger Williams Ins. Co., *supra* note 3;
Howell v. Philadelphia Mut. Ins. Co., 12 Fed. Cas. 706, No. 6,781 (C.C.Md. 1851).
The English Marine Insurance Act of 1906, *supra* note 6, is explicit in this regard, making its definition of a constructive total loss "Subject to any express provision in the policy . . ."

[8] *Soelberg v. Western Assur. Co.*, 119 Fed. 23, 29 (C.C.A. 9th 1902).

[9] *Id.* at 30.

[10] *Id.* at 31.

> In order to entitle the plaintiffs to recover it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. They must bring their case within the provisions of the contract for insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. This general principle is supported by abundant authority.

Support is hardly needed for this proposition that one who seeks to enforce a contract of insurance is bound by the terms thereof, although examples of its application are readily at hand. In one analogous instance a policy provided:

> No recovery for a constructive total loss shall be had hereunder, unless the expense of recovering and repairing the vessel shall exceed the insured value

which value was established by the policy at $85,000. The District Court, quoted with approval by the Circuit Court of Appeals for the Third Circuit in affirming *per curiam*,[11] ruled that under this provision, if the sunken vessel could have been raised and repaired at a cost of less than $85,000, the assured had no right to claim a constructive total loss, there being no reason why an insurance policy should not contain limitations upon the right to abandon and recover for such a loss.

Another policy under which an assured claimed for constructive total loss provided:

---

[11] *Klein v. Globe & Rutgers Fire Ins. Co.*, 2 F. (2d) 137 (C.C.A. 3d 1924).

> No abandonment shall in any case be effectual unless the amount of the loss exceeds 75 per cent. of the combined value in this policy as set forth above.

By means of a further stipulation in the policy this value was set at $100,000 for purposes of claiming total loss. Accordingly, it was held that loss must exceed $75,000 to make an abandonment effectual.[12]

In still another case,[13] an assured sued upon the theory of constructive total loss under a policy providing that—

> There shall be no abandonment as for a constructive total loss . . . unless the cost of necessary repairs . . . be equivalent to 75 per cent. of the agreed value of the vessel as specified herein.

Agreed value was specified as $3,000. Finding that the policy itself thus defined a constructive total loss to be such damage as to make necessary repairs costing at least 75 per cent of $3,000, the court said:[14]

> The clause in the insurance policy which enables him to make an abandonment in a proper case, and determining the conditions under which the abandonment may be made, is just as much a part of the insurance policy as any other stipulation or condition contained in the policy.

This policy of insurance contains just such limitations upon recovery for constructive total loss, reading as follows:

---

[12] *Chicago S.S. Lines v. United States Lloyds*, 2 F. (2d) 767 (N.D. Ill. 1924), *aff'd* 12 F. (2d) 733 (C.C.A. 7th 1926).
[13] *Searles v. Western Assur. Co.*, 88 Miss. 260, 40 So. 866 (1906).
[14] *Ibid.*, 40 So. at 869.

> No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value. (R. 7)
>
> In ascertaining whether the vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account. (R. 7, 8)
>
> Notwithstanding anything herein contained to the contrary, it is mutually understood and agreed that in ascertaining whether the vessel is a Constructive Total Loss, $21,000.00 shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. (R. 9)

Integrated and reduced to their lowest common denominator, the foregoing terms simply define a constructive total loss, upon the occurrence of which the assured is entitled to abandon the insured sampan to the underwriter and recover the policy's face value, as that injured condition of the vessel in which the expense of recovering and repairing her shall exceed the sum of $21,000. These provisions were absolutely determinative of the appellee's right to abandon the vessel and recover for constructive total loss. They imposed upon her the burden of proving that damage to MISS PHILIPPINE exceeded $21,000.

Scant recognition of this express condition upon recovery was given by the trial court in its decision, a rambling chronology entitled "Findings as Gleaned and Construed from Evidence," and even that passing reference

was couched in terms calculated to sap its vitality. It was there stated that neither the libelant (appellee) nor her husband ever saw the policy, that they were given no opportunity to read it, and that the policy and its terms were in no manner explained to either of them (R. 14). The irrelevancy of these findings is self-evident, as such facts could become material only if the appellee were seeking to avoid the policy. Appellee's proctor denied entertaining such a theory (R. 183); and he could hardly attack the validity of the contract consistently with his suit to enforce it.

That appellee procured this policy in order to borrow money from the Bank of Hawaii upon the security of her sampan (R. 89-90, 178) explains why she may not have received custody of the policy until that mortgagee had waived claim thereunder (R. 6, 46), but the relevancy of these facts escapes detection. The court might with equal pertinency have observed that nothing prevented the appellee, during some six months between the policy's issuance and the vessel's stranding, from inspecting and reading the policy in the hands of her agent, the bank, or from soliciting from any source advice in arranging suitable insurance coverage or full explanation of the protection afforded by this particular policy. On this latter point, it would have been a fair inference that the appellee knew what she was getting when she changed from her earlier high-premium insurance to this three-per-cent policy against total loss only (R. 179). We deem all such factors as irrelevant to the real issue as these objectionable findings, yet they have equal foundation in the record

and merit like consideration if a trial court is to indulge in irrelevancies as the basis for its decision.

Careful reading of this decision leaves the firm conviction that the court below, having found that the assured had no knowledge of the policy's limitations upon recovery for constructive total loss, summarily dismissed those provisions from further consideration. At no other point in the decision are they even mentioned, nor does the court undertake to define what would constitute a constructive total loss under this policy. What magic formula was employed in concluding that the appellee's abandonment of the vessel was justified remains undisclosed.

To similar disregard urged with respect to such stipulations contained in a marine policy, another federal court has given the complete refutation:[15]

> If the assured did not know that such a warranty was to be found in the policy, it was because he did not take the trouble to read it. We find it in the policy and it is as much a part of the contract as any other, and is as binding on the parties as any other.

This implicit rejection of the controlling terms of the policy sued upon was clear error.

Certainty of Damage Necessary.

The mere stranding or submersion of a vessel does not of itself furnish sufficient ground for abandonment, as that right depends upon all attendant circumstances of

---

[15] *Levi v. New Orleans Mut. Ins. Ass'n*, 15 Fed. Cas. No. 8,290, at 420-421 (C.C. La. 1874).

each case as well as the terms of the insurance contract involved; and on frequent occasion it has been held that an owner claiming for constructive total loss was not justified in abandoning his stranded or sunken vessel under the circumstances which prevailed at the time of abandonment.[16] In general, these cases merely illustrate failure of the assured to prove his loss to lie within the terms of his policy.

This policy of insurance establishes the quantum of damage which will justify abandonment for constructive total loss, namely, expense of recovery and repair exceeding $21,000. In any case falling short of absolute total loss, however, it seems unlikely that either owner or underwriter could know beyond any doubt the extent of actual injury sustained without completely recovering and repairing the vessel. How certain, then, must be this measure of damage to justify abandonment and permit recovery as for total loss?

Chancellor Kent gave to our early law this classic statement of the guiding principle involved:[17]

> The right of abandonment does not depend upon the certainty, but upon the high probability of a total

---

[16] *E.g., Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11; *Chicago S.S. Lines v. United States Lloyds, supra* note 12; *Copeland v. Phoenix Ins. Co.*, 6 Fed. Cas. 507, No. 3,210 (C.C. Mo. 1868), *aff'd on other grounds sub nom. Copelin v. Insurance Co.*, 9 Wallace 461 (U.S. 1869); *Searles v. Western Assur. Co., supra* note 13. *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 33 Am. Dec. 727 (Mass. 1839); *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450, 22 Am. Dec. 337 (Md. 1831); *Wood v. Lincoln & Kennebeck Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163 (1810).

[17] 3 *Kent Comm.* *321.

> loss, either of the property, or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense.

Known today as the "high probability rule," this doctrine has enjoyed wide application in determining whether the right to abandon existed under particular circumstances. Mr. Justice Story, speaking for the Supreme Court in reviewing the case of a stranded brig, quoted the rule with approval and further stated:[18]

> In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although by some fortunate occurrence, she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, *if, in all human probability, the expenditures which must be incurred to deliver her from her peril, are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability,* beyond half value; and if her distress and peril be such as would induce a considerable owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. (Emphasis supplied).

---

[18] *Bradlie v. Maryland Insurance Co.*, 12 Peters 378, 398 (U.S. 1838);
Accord, Orient Insurance Co. v. Adams and *Royal Exch. Assur. v. Graham & Morton Transp. Co., supra* note 4.

These remarks were addressed to the proposition that, the distressed vessel having been recovered and repaired, actual expense thereof formed the only criterion of the owner's right to recover for constructive total loss. While conceding that the cost of subsequent repairs affords one of the best proofs of actual damage, the Court declined to make it absolutely decisive and expressly approved this instruction given by the circuit court, under which the jury had denied any award for total loss:[19]

> . . . if the jury find that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value, then upon the evidence offered, the plaintiffs are not entitled to recover for a total loss . . .

It is instructive to consider several more recent cases applying this rule. In *Chicago S.S. Lines v. United States Lloyds*,[20] where the insured steamer had sunk at her dock, been abandoned by the assured, and was raised promptly by the underwriter, the court ruled that loss must exceed the policy limit of $75,000—either actually or in high probability—in order to justify the abandonment, saying:[21]

> He is not entitled, without investigation, and without due foundation of fact or extreme probability of fact, to throw the burden upon the insurers.

After reviewing all expert opinion on the cost of recovering and repairing the vessel, none of which reached the

---

[19] *Id.* at 395, 400. Instructions substantially similar were approved in *Patapsco Insurance Co. v. Southgate* and *Orient Insurance Co. v. Adams, supra* note 4.

[20] *See* note 12 *supra*, 2 F. (2d) 767.

[21] *Id.* at 770.

sum of $75,000, the court concluded that there was no high probability of such damage as to warrant abandonment for a constructive total loss. Upon appeal, the Circuit Court of Appeals for the Seventh Circuit considered that expert testimony, as well as the fact that the salvor had bid only $5,500 to raise the vessel and place it alongside the dock, and held that the great preponderance of evidence showed that there was at no time a high probability of constructive total loss.[22]

An extremely lucid interpretation of the rule was given by the trial court in *Klein v. Globe & Rutgers Fire Ins. Co.*[23] as to the right of an assured:

> . . . he is not entitled, without investigation and without due foundation of fact or extreme probability of fact, to place the entire burden upon the insurer by an abandonment. He must determine for himself whether he has the right to abandon. If he is able to show that the cost of restoring the vessel, 'so far as any reasonable calculations can be made', would exceed the amount which would constitute it a constructive total loss, he is safe in abandoning it; but it must be remembered the existence of the fact that it would so exceed the amount, constituting a constructive total loss, is the criterion of his right to abandon.

In that case an insured river-boat sank in some thirty-three feet of water of the Mississippi River, from which she undoubtedly could have been raised and repaired if she had not broken upon sinking. Whereas the underwriter had the sunken boat examined twice by divers, who testified that they found her intact, the owner neglected

---

[22]*See* note 12 *supra*, 12 F. (2d) at 738.
[23]*See* note 11 *supra*, 2 F. (2d) at 141-142.

to have such expert examination made and relied upon general opinion testimony to show breakage circumstantially. Commenting that such neglect was not the conduct of a considerate owner, uninsured, the court concluded that the boat could have been restored for less than $85,000—the limitation fixed by the policy in question—and therefore the assured was not entitled to abandon her and recover for a constructive total loss. In affirming this decision, the appellate court ruled that the assured had not borne the burden of showing that his loss was total.[24]

The so-called "high probability rule" appears to receive as equable credit modernly as accorded it over a century ago,[25] excepting only where it is deemed displaced by contractual terms restricting abandonment to certain conditions. In one instance a circuit court said of such terms:[26]

> The right of abandonment is made to depend upon the result, and not upon a calculation of probabilities. No right to abandon is admitted when the loss is not strictly and technically an actual total loss, unless, as it turns out, the expense of restoration exceeds one-half the value.

And this Court has also indicated[27] that such provisions leave no room for the "high probability rule"—that actuality rather than high probability of excessive expense

---

[24] *Id.* at 144.

[25] *Jeffcott v. Aetna Ins. Co., supra* note 4, 129 F. (2d) 582.

[26] *Wallace v. Thames & Mersey Ins. Co., supra* note 7, 22 Fed. at 70.

[27] *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 635 (C.C.A. 9th 1916); *Soelberg v. Western Assur. Co., supra* note 8, 119 Fed. 23.

must then determine the right to recover for constructive total loss.

Thus the policy's limitations on abandonment are taken to define the quality of proof by which the specified quantum of damage must be shown, requiring that an assured who would recover for a technical total loss establish actual expense of recovering and repairing his vessel exceeding such amount, not merely the highest probability of costs in that sum had recovery and reparation been undertaken. However, we find it unnecessary to dwell on this point since, just as in the cases cited above,[28] this appellee has made no attempt to carry even the lesser burden of proof imposed by the "high probability rule."

It is appellant's thesis here that the court below, having already chosen to ignore the paramount limitations upon recovery as fixed by this policy of insurance, also rejected the only settled rule of law which could govern the right of abandonment and recovery. It concluded expressly that the "human probabilities rule" was not of value in the facts of this case (R. 22), thus leaving to conjecture the equation by which it held the appellee's abandonment justified and appellant liable for a constructive total loss under the policy. This was manifest error of law under all authorities treating of abandonment for constructive total loss.

We can only deplore such decision by intuition. It disturbs principles nurtured on centuries of commerce and, not the least here, imposes upon this appellant an obliga-

---

[28] *Ibid.*

tion not assumed by its lawful contract. Had the trial court given due effect to the policy's terms and the established rules governing abandonment, it could only have supported its decision on the ultimate issue of recovery by concluding that expense of recovering and repairing MISS PHILIPPINE, in her condition when abandonment was tendered, would—"in all human probability," "in extreme probability of fact," and "so far as reasonable calculations could be made"—exceed $21,000. No such conclusion was reached, nor does the decision contain findings upon which it might be predicated; nor, indeed, would the evidence warrant such findings and conclusion.

B. NUMEROUS FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

Appellant urges no error in the admission or exclusion of evidence but only in what the court below did with that evidence. In numerous respects the findings filed in support of its decision are so unsupported by any competent evidence, so far at variance with the obvious weight of evidence or with undisputed facts, so irrelevant and misleading, or so patently slanted to lend substance to a claim otherwise without foundation in the record, as to merit the attention of this Court on appeal.

In raising these factual questions we are not unmindful of the salutary rule that, where a substantial part of the evidence was heard in open court, findings of the trial court are accompanied with the rebuttable presumption of correctness[29] and should not be disturbed unless clearly erroneous as against the weight or preponderance of the

[29] *The Pennsylvanian*, 139 F. (2d) 478 (C.C.A. 9th 1943).

evidence.[30] The rule's corollary, of course, is that such findings are clearly wrong and cannot stand unless supported by substantial evidence.[31] Findings of fact required in admiralty[32] also must not be discursive nor state the evidence or any of the reasoning thereon but should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law,[33] a principle ignored by the court below. We believe that upon this trial *de novo*[34] this Court, in weighing the evidence of record and making its independent "examination, thought and judgment"[35] thereof, will find clearly erroneous and will correct the following findings of the District Court:

1. That on June 8, 1949, parts of the vessel's keel were carried away.

This is hardly an instance of conflicting evidence, since the expert witnesses produced by both parties were in complete accord as to the intact condition of the vessel's keel on the strand (R. 66, 127). Obviously striving to justify his cancellation of salvage and subsequent inaction on behalf of the vessel, Mr. Cadiente stated repeatedly that her keel was all gone or almost gone (R. 92, 107, 167,

---

[30] *Drain v. Shipowners & Merchants Tugboat Co.*, 149 F. (2d) 845 (C.C.A. 9th 1945); Rule 52(a), *Federal Rules of Civil Procedure.*

[31] *Cf. Bornhurst v. United States*, 164 F. (2d) 789 (C.C.A. 9th 1947); *Stetson v. United States*, 155 F. (2d) 359 (C.C.A. 9th 1946), and cases there cited.

[32] Admiralty Rule 46½, 28 U.S.C.A. following Sec. 2073 (formerly Sec. 723).

[33] *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F. (2d) 992 (C.C.A. 2d 1942).

[34] *Ibid.; Drain v. Shipowners & Merchants Tugboat Co., supra* note 30.

[35] *The Ernest H. Meyer*, 84 F. (2d) 496 (C.C.A. 9th 1936).

173), implying that the wooden sampan could therefore not be saved. Such repetition apparently impressed the trial court, although the witness himself conceded that he had little opportunity to observe that condition of the vessel (R. 120). Hence this finding, predicated upon inexpert and speculative testimony, stands without substantial foundation in the record.

2. That libelant-appellee decided on June 8, 1949, to abandon the vessel.

This finding (R. 16) is objectionable as being wholly irrelevant and based upon the uncorroborated testimony of Mr. Cadiente himself (R. 92). He was not even consistent, indicating at one point that he made up his mind the next day after returning to Honolulu (R. 170). Significantly, the court itself recognized upon appellant's objections that what he was thinking could not bind the appellant in any manner (R. 167, 168).

Technical abandonment, without which there can be no such thing as a constructive total loss,[36] is neither the act of leaving a vessel unattended in its distress nor the subjective intent to give her up as lost; rather, it consists of the objective manifestation of such intention by the owner's surrender of his interest to the underwriter. Sufficiency of an abandonment rests not merely on the occurrence of justifying facts but upon their knowledge by the assured and communication thereof to the underwriter,

---

[36] *Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11, 2 F. (2d) 137; *Standard Marine Ins. Co. v. Nome Beach L. & T. Co., supra* note 3, 133 Fed. 636.

with an offer to abandon.[37] No particular form of abandonment has been prescribed by law, but unequivocal notice thereof must be given to the insurer or there can be no recovery as for total loss.[38] The following language of the Supreme Court as to the character of such notice has become the established rule:[39]

> It seems, however, agreed that no particular form is necessary, nor is it indispensable that it should be in writing. But, in whatever mode or form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title, and interest in the subject insured.

Notice there must be, and its tender to the underwriter constitutes the abandonment. The appellee's mental processes and decisions are therefore of no moment here, and any finding thereon and inference therefrom must be disregarded as immaterial to the issue at bar.

---

[37] *Bullard v. Roger Williams Ins. Co., supra* note 3, 4 Fed. Cas. 643, No. 2,122; *King v. Delaware Ins. Co.*, 14 Fed. Cas. 516, No. 7,788 (C.C. Pa. 1808); *Hilton v. Federal Ins. Co.*, 118 Cal. App. 495, 5 P. (2d) 648 (1931); *Gomila v. Hibernia Ins. Co.*, 40 La. App. 553, 4 So. 490 (1888); *Thomas v. Rockland Ins. Co.*, 45 Me. 116 (1858); *Heebner v. Eagle Ins. Co., supra* note 6, 76 Mass. 131, 69 Am. Dec. 308; *Smith v. Manufacturers' Ins. Co.*, 48 Mass. 448 (1844); *Bosley v. Chesapeake Ins. Co., supra* note 16, 3 Gill & J. 450, 22 Am. Dec. 337.

[38] *Ibid.*

[39] *Patapsco Insurance Co. v. Southgate, supra* note 4, 5 Peters at 622; *accord, Chicago S.S. Lines v. United States Lloyds, supra* note 12, 12 F. (2d) 733 (no proper notice of abandonment given).

3. That Mr. Cadiente asked the Coast Guard on June 8, 1949, to notify respondent-appellant of abandonment.

This finding appears unsupported by even the testimony of Mr. Cadiente (R. 109, 168), but is rather an assumption propounded by the court upon trial (R. 172) and perpetuated in its decision (R. 16). And, had this witness so testified, it would have been mere hearsay repetition of self-serving statements. Such a finding was clearly wrong.

4. That Mr. Cadiente told Captain Hagood on June 9, 1949, that he had abandoned the vessel.

Both the testimony (R. 176) and finding (R. 16) on this point are irrelevant, since only the owner's notification to the underwriter will effect an abandonment.[40] It is undisputed that at the time of this statement, Captain Hagood was merely an employee of King Limited with whom the appellee had contracted for salvage of the vessel (R. 47, 64). There is no suggestion, nor could there be, that notification to the appellee's own agent amounted to tender of abandonment to the appellant.

5. That after discussion with the vessel's builder on June 9, 1949, libelant-appellee was confirmed in the judgment and decision to abandon her.

Mr. Cadiente sought to justify the abandonment as proper by testifying that upon his return to Honolulu he consulted the vessel's builder, explained to him the condition of the sampan, and solicited his advice (R. 169).

---

[40] *See* assignment No. 2 *supra*.

However, as appellant's proctor objected at this point in the trial, his testimony as to the boat-builder's advice would be hearsay evidence. The trial court sustained this objection, ruling that what the boat-builder told that witness must come from the boat-builder (R. 170). Moreover, it was apparent that any opinion which might have been expressed by Mr. Tanimura, the boat-builder, was based not upon his personal observation but upon Mr. Cadiente's own description of the vessel's condition.

Thus the trial court in making this finding (R. 17) not only ignored its own evidentiary ruling but compounded its error by giving credit to hearsay advice rendered upon hearsay description; and, indeed, it went beyond the record in necessarily assuming the nature of that advice, a matter not in evidence.

6. That libelant-appellee on June 10, 1499, told respondent-appellant and its attorney that she had abandoned the vessel.

Mr. Cadiente testified that on June 10th he called at appellant's office and notified its representative, Mr. Matthew, that he was abandoning the sampan; and he was positive in asserting that on the same morning he attended a conference in the office of appellant's attorney, at which he gave the same notice (R. 174-176). However, the date of that conference was established beyond doubt as June 13th by the testimony of appellee's own witness, Mr. McAndrews of King Limited (R. 188-189, 192-195), and by stipulation of appellee's proctor made in open court (R. 196-198). Such admissions of fact by an attorney upon

hearing are, of course, binding upon his client's case.[41] Thus the record shows conclusively that the appellee tendered abandonment of MISS PHILIPPINE when, to the knowledge of both parties, she was in tow on the high seas (R. 191).

We stress the importance of accuracy in fixing the date of abandonment because the state of facts actually existing at that time determines the assured's right to abandon and claim for constructive total loss.[42] Unless the vessel had at that point in time sustained such injury that the expense of her recovery and repair would exceed $21,000, appellee had no right to abandon.[43]

7. That respondent-appellant's attorney on June 10, 1949, told Mr. Cadiente to come back and bring his wife on June 13, 1949.

Nothing in the record supports this finding (R. 17), and it is but another example of the liberties taken by the trial court with the evidence in this case (R. 193).

8. That before leaving Kaunakakai on June 14, 1949, Captain Hagood told Yamamoto that he could have the vessel if he moved it away from the wharf.

Here again the court's finding (R. 21) is absolutely without foundation in the record. Presumably it infers

---

[41] *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1880); *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (C.C.A. 9th 1945); *New York Evening Post Co. v. Chaloner*, 265 Fed. 204 (C.C.A. 2d 1920).

[42] *Rhinelander v. Insurance Co. of Pennsylvania, supra* note 1, 4 Cranch 29; *Marshall v. Delaware Insurance Co., supra* note 1, 4 Cranch 202; *Bradlie v. Maryland Insurance Co., supra* note 18, 12 Peters 378; *Orient Insurance Co. v. Adams, supra* note 4, 123 U.S. 67.

[43] *See* part I. A *supra.*

that, had the salvor made such a statement to his friend, he must then have considered the vessel worthless—an inference contradicted by his stated opinion that the vessel still had some value (R. 70). The trial court not only went outside the evidence in attributing to Captain Hagood this statement which admittedly did not appear in his testimony (R. 20-21) but also erred gravely in fixing June 14th as the time of the conversation with Yamamoto. Hagood testified to his arrival at Kaunakakai early that morning, and that as soon as he made the vessel fast to the dock he got under way to Honolulu (R. 54), and that he contacted Mr. Yamamoto on September 30th (R. 57).

As a matter of record, the appellee's evidence from the mouth of Mr. McAndrews discloses that King Limited did not give Yamamoto authority to take possession of the vessel but merely relinquished any right against her for salvage (R. 87).

9. That Captain Hagood testified that he would not have accepted the wreck as a gift.

The error inherent in this finding (R. 21) lies in the court's relation of this testimony to Captain Hagood's towing of the vessel into Kaunakakai harbor on June 14, 1949, rather than to an examination made by him almost four months later. Hagood described her condition on September 30th, at which time she was raised on blocks in the back yard of Mr. Yamamoto, with her engine removed, pilot house and cabin taken off, planking stripped off, and hull pierced in order to support her on the blocks (R. 57). He also noted that considerable damage had been

inflicted by Yamamoto in removing her from the water and that marine worms were then attacking her hull (R. 57-58), concluding—

> I wouldn't have taken it as a gift at that point. (R. 58).

Even if this finding had been correctly oriented in time, it would still remain wholly irrelevant to the issue of whether the vessel was a constructive total loss when abandoned on June 13th,[44] a truism which the trial court refused to recognize (R. 58-59) until the appellee offered evidence of the vessel's condition on December 2, 1949 (R. 98-100).

> 10. That the vessel's sponsons were crushed by respondent-appellant in righting the vessel at Kaunakakai Wharf.

By this finding (R. 21) the trial court held that appellant's acts of saving and preserving the vessel damaged her further, yet the uncontradicted testimony of experts for both parties is to the contrary.

Captain Hagood stated that the sponsons had been crushed by the wire rope slings which Yamamoto had passed around the hull of the vessel in order to lift her to the dock by crane (R. 57-58). Mr. Gallagher, who supervised the righting of the capsized sampan, testified that Manila rope rather than wire had been used to rotate her, in order to avoid inflicting injury in the process (R. 152). And in response to direct questions from the bench, he said that the vessel's walls had not been crushed by the

---

[44] *See* assignment No. 6 *supra*.

pressure of the hawser around her, but that such injury might have occurred in removing her from the water (R. 153-154). There is no evidence that damage of this nature would necessarily be sustained by the vessel in the course of reparation.

11. That neither party replied to a letter of King Limited dated July 16, 1949, stating that company's intention to cannibalize and destroy the vessel.

The letter to which this finding refers (R. 21) does not appear in evidence, although the appellee attempted to introduce such a letter and was met by appellant's objection to its relevancy (R. 85-87). Neither party reached the point of showing any reply. The court thus went beyond the record in making this finding and drawing any inference therefrom.

12. That respondent-appellant questioned the right of libelant-appellee to refuse to take over the vessel at Kaunakakai.

This statement (R. 21) by the court below reflects a basic misconception of the only issue here involved: the right of appellee to recover for a constructive total loss of her sampan (R. 3, 12). Appellant never questioned the right of the appellee to refuse the vessel after salvage, or to throw away any of her other property, but consistently took the position that the vessel was her responsibility. Its letter dated June 17th to appellee's attorney, wherein appellant advised that the sampan was tied in a righted position at Kaunakakai pier and still owned by the appellee, speaks for itself (R. 104-105).

13. That respondent-appellant undertook to salvage the vessel after receiving notice of abandonment.

Failure of the court to make accurate determination of the time of abandonment, as fixed by undisputed testimony and stipulation,[45] resulted in this erroneous finding (R. 21-22). Chronologically, appellant undertook to save the vessel only after her owner had failed to make any effort toward that end,[46] despite demand made upon her (R. 111), and the vessel had already been successfully removed from the rocks and was under tow by the salvor when appellant became apprised of the assured's intention to abandon.

14. That respondent-appellant abandoned the vessel at sea.

In reaching its ultimate conclusion, the court below appeared to rely heavily on what it characterized as appellant's "abandonment" of the vessel at sea on June 13th, as not only constituting constructive acceptance of the owner's abandonment but also indicating appellant's belief that salvage was hopeless (R. 22, 23). Obviously the court spoke of abandonment in the colloquial rather than technical sense of marine insurance. However defined, that label was erroneously attached to appellant's refusal to commit more money toward financing salvage after the appellee had tendered abandonment of MISS PHILIPPINE.

While the rescued vessel was under tow along the leeward side of Maui on June 13th, the appellee first gave

---

[45] *See* assignment No. 6 *supra*.
[46] *See* part II *infra*.

notice of abandonment to appellant, as a result of which several meetings were held that same day amongst all three parties then concerned.[47] At the first of these meetings appellant emphasized that it still looked to the appellee to salvage the vessel and urged her to seek independent counsel (R. 189), thus rejecting her abandonment; and King Limited disclosed that it had exhausted the $1500 which appellant had contributed toward salvage, had the vessel in tow on the high seas, and desired to know whether appellant would spend any more money on salvage (R. 190-193). At the subsequent meeting, attended by appellee's attorney, Mr. McAndrews of King Limited reported the position of the tow and was informed that appellant had no further instructions concerning salvage (R. 194-195).

This denial of further instructions to the salvor, this refusal to invest further in salvage of another's property, was the very antithesis of the dominion of ownership. It was entirely consistent with appellant's refusal to accept surrender of appellee's interest in the property and insistence that she proceed with salvage; and it signified that the salvor must look to either the appellee or the vessel herself for reimbursement of additional salvage charges. It was no concern of the underwriter should the appellee choose not to recover her vessel; but on the other hand the salvor's lien, together with practical considerations which the court below ingenuously ignored, assured appellant that the vessel would be taken to port and not given to the sea. As Captain Hagood put it:

---

[47] *See* assignment No. 6 *supra*.

> I couldn't very well abandon her in the middle of the ocean because I would have gotten into trouble with the U.S. Coast Guard for leaving a menace to the sea. So I had to take her someplace and I dragged her to Kaunakakai. (R. 69).

And as both parties then knew that the vessel had been removed successfully from the strand and was well on her way to a safe port, this refusal to instruct the salvor cannot by even the most tortuous logic be construed to indicate that appellant had given up saving her. Appellant at considerable expense had already proved its point: that it was feasible to get the vessel safely to port.

C. EXPENSE OF RECOVERING AND REPAIRING THE VESSEL WOULD NOT EXCEED $21,000.

Winnowing from the decision below those patently improper and unsupported findings leaves nothing upon which to rest the conclusion of justified abandonment by appellee and liability of appellant for constructive total loss of the insured vessel. Appellant therefore assigns the following as error:

> 15. That the District Court erred in failing to conclude that the vessel, in either her stranded position or her righted position at Kaunakakai wharf on June 14th, could in all human probability have been recovered and repaired at a cost not exceeding $21,000.
>
> 16. That the District Court erred in failing to conclude that at the time of abandonment the vessel was not a constructive total loss within the terms of the policy and that libelant-appellee had no right to abandon her and claim for a constructive total loss.
>
> 17. That the District Court erred in entering its final decree herein.

Review of the record leaves no doubt that appellee misapprehended her burden of proof in this case. She made no attempt to show what the cost of recovering MISS PHILIPPINE from the strand and of repairing her would be, apparently content to rest her case upon inexpert generalities directed to the propositions that the vessel either could not be saved or was not worth saving. No volume of credible testimony on these points could warrant a recovery for constructive total loss in the absence of competent proof that expense of recovery and repair would exceed the stipulated sum of $21,000, yet the record is barren of such proof.

A brief summary of the evidence adduced by appellee will demonstrate this fatal default of proof.

Henry Morton, master of the stranded sampan, testified that when the Coast Guard boat arrived at the scene on June 6th, he told them that there was nothing they could do (R. 73).[48]

He said he noticed water coming through the engine room, the bottom broken, the ice-box broken, and the whole bottom gone (R. 73), although admitting that he didn't inspect the hull from outside during his three days at Kaupo (R. 77). Concerning efforts to save the vessel, he stated that they—

> . . . couldn't do nothing because we didn't have no equipment there. (R. 73-74).

Thus he implied that salvage might have been effected with proper equipment.

---

[48]Note the erroneous finding of the trial court attributing this extra-judicial opinion to the Coast Guard (R. 15).

Mr. Cadiente also reflected this defeatism. On June 7th he observed a big hole in the vessel's hull and water flooding through her engine room under the deck (R. 92). The next day he again inspected the vessel and, according to his testimony, found all the keel almost gone and some of the ribs gone (R. 92); and he described her condition as badly damaged (R. 107), plenty damaged (R. 118), getting worse and worse (R. 167). Although neither a fisherman nor a seaman himself (R. 113, 114), he decided that his crew could not salvage the vessel themselves because there was no equipment available (R. 92, 93).

On meager evidence of this nature did appellee seek to justify her abandonment. Significantly the boat-builder, whose unexpressed opinion the court below found so meritorious, was not even called to testify; and neither was Mr. Yamamoto, who undertook to rebuild the vessel for his own use, nor any other witness qualified to advise the court regarding prospective costs of recovery and repair. Even more significantly, appellee's only witness on the subject of salvage refuted the claim of constructive total loss.

Captain Hagood of the MAIZIE-C inspected the vessel from the air on June 7th and concluded that he could rescue her from the strand (R. 63), and upon the authorization of Mr. Cadiente he returned to Honolulu to undertake her salvage (R. 64). On June 11th he found the vessel in the same position on the rocks with her keel still intact though chafed, four or five ribs knocked out, her fore peak holed and some bottom-planking gone, but with her engine and engine-bed still intact; and he satisfied himself that she would not come apart when pulled

and would remain towable when taken off the beach (R. 51, 65-66). In brief, Hagood's inspection on this date merely confirmed his earlier conclusion that he could get her off and tow her successfully (R. 65). His effective salvage operation conducted on June 12-14, 1949, gave ample verification of his skillful analysis of the situation.

It was upon this state of evidence that appellee rested her case. Since appellee had failed to prove, by so much as a scintilla of evidence relating to expense of recovering and repairing the vessel, that she had sustained a constructive total loss within the terms of her policy of insurance, appellant was entitled at that point to dismissal of the libel. One cannot propound a case more squarely within the ruling of *Soelberg v. Western Assur. Co.*,[49] involving a policy which denied the right to abandon unless damage exceeded a certain amount, wherein this Court approved a peremptory instruction to the jury that the assured had failed to prove a constructive total loss within the terms of the policy in question, stating:[50]

> . . . no evidence appears in the record to give any basis whatever for the determination of the percentage of damage. The only evidence in this regard is confined solely to the proposition, heretofore stated, that the vessel when repaired would not be worth the cost of repairs, which is, as we have heretofore attempted to show, wholly insufficient. There must be some testimony upon which a jury could act in fixing the amount of damages. There being none, the court did not err in directing the jury to find a verdict for defendants.

---

[49] *See* note 8 *supra*, 119 Fed. 23.
[50] *Id.* at 33.

Appellant's motion to dismiss was denied (R. 121-122). This erroneous ruling of the court below is not challenged on appeal because appellant thereafter went forward with evidence and proved affirmatively that appellee had no ground for recovery on the policy.

Mr. Frank Gallagher, a practicing marine surveyor of considerable professional experience (R. 123-124, 133), testified for appellant that he conducted a survey of the stranded vessel on June 7, 1949. At that time he ascertained damage which included a large hole in the starboard planking of the engine compartment, remaining planking of engine and fish compartments intact but sustaining damage through constant rocking of the vessel by waves, keel and stem scuffed by rocking action but intact as structural members, rudder carried away, and propeller and shaft badly damaged (R. 126-128). There was then no injury to the vessel above her chines (R. 128). In his professional opinion, she was then completely salvageable (R. 126), had sufficient value to warrant her repair for further use (R. 136), and should have been salvaged immediately (R. 129).

Again on Saturday, June 11th, Mr. Gallagher attended the stranded sampan. He testified to finding her damage increased about twenty per cent from the friction of rolling on the rocks, caused by normal surge of the sea, but concluded that she was still salvageable (R. 130-131).

In these observations and opinions Mr. Gallagher corroborated substantially the views expressed by appellee's own witness, Captain Hagood. There was no material disagreement in their expert testimony either as to the

vessel's condition on the strand or the feasibility of getting her off.

Mr. Gallagher made a final survey of MISS PHILIPPINE at Kaunakakai on June 14th when, at his recommendation, the vessel was rotated from her capsized position and tied, keel-down and buoyant, at the wharf (R. 132, 150, 153). Considering the vessel's condition at that time, he expressed the estimate that her repairs could be effected for about $7,000 in Honolulu and that cost of towing her to Honolulu would be about $700 (R. 135, 136). He also stated his opinion that the vessel could be towed to Honolulu in her existing condition or temporarily repaired at Kaunakakai by means of salvage patches, and that it was also feasible to transport her by barge (R. 146, 152).

We cannot over-emphasize that the foregoing testimony stands alone and unimpeached on the vital question of expense of recovering and repairing the vessel and, when superimposed upon appellant's actual expenditures in salvaging the sampan (R. 159), shows that such expense would not rise to even one-half of the amount necessary for a constructive total loss under this policy.

The court below deemed this estimate of costs not convincing, believing that such testimony "could be so highly colored by guesswork alone" (R. 22), yet it had before it no other evidence from which to draw a conclusion as to the expense of recovering and repairing MISS PHILIPPINE. The master's opinion concerning the necessity of abandonment is not controlling but must be justified by existing circumstances,[51] which are expenses of recovery

[51] *Patapsco Ins. Co. v. Southgate, supra* note 4, 5 Peters at 621.

and repair exceeding $21,000 under this policy. What must guide a court in its determination of such matters if not the considered opinion of men experienced in that field? One District Court sitting in New York has given a far more rational evaluation of such testimony, as follows:[52]

> It is difficult to analyze or dispute the testimony of such witnesses about matters of their judgment: their businesses operate in utter dependence upon them; their conclusions are largely relative and only the actual operation can prove how far they were wrong, if at all; their facilities and the expertness of their workmen and even of the workers in different departments of each bidder are different, *but this is no reason why their testimony should be discarded or even doubted by a judge.* We are persuaded that in the absence of any satisfactory effort by respondent to prove any of the bids or any part of them unreasonable or unacceptable, proof of any one would have been satisfactory performance of libellant's duty to bear the burden of proof which we recognize. (Emphasis added.)

This situation, of course, is the converse of the *Jeffcott* case, this assured having made no showing of actual or probable expense and appellant having tendered the only evidence on that subject. It bears strong resemblance to the case of *Searles v. Western Assur. Co.*,[53] arising under a policy which defined constructive total loss as damage necessitating repairs at a cost of 75 per cent of the barge's agreed value. That owner rested his

---

[52]*Jeffcott v. Aetna Ins. Co.*, 40 F. Supp. 404, 408 (S.D.N.Y. 1941).

[53]See note 13 *supra*, 88 Miss. 260, 40 So. 866.

case upon proof that the barge sank as a result of an insured peril, that he deemed it of no value and gave notice of abandonment, and that he spoke with many men about raising it but all knew of its condition and would not undertake the job; whereas the underwriter produced several marine experts to show the feasibility of recovery and repair. Approving a peremptory instruction for the underwriter, the reviewing court held:[54]

> It was incumbent on appellant to make this proof in the court below and we think he utterly failed to do so. . . . Appellant not only fails to make out a case, but the defendants show beyond dispute, putting the testimony most strongly for appellant, that to repair the damage caused solely by the disaster . . . would cost less than 25 per cent of $3,000, the agreed value of the vessel.

With but slight revision in figures, the above language could not describe this case more aptly.

In a decision of similar tenor, where the underwriters showed that in the opinion of experts—men of large experience and competent knowledge on the subject—a sunken boat might have been raised and repaired in short time, their highest estimated cost of raising and repairing being $2,000, it was held that the assured had failed to prove a right to abandon and recover as for total loss under a policy valuing the boat at $9,000.[55]

It would have been difficult for the appellee to abandon under circumstances less calculated to justify that act.

---

[54] *Ibid.*, 40 So. at 869.

[55] *Hundhausen v. U.S. Fire & Marine Ins. Co.*, 3 Tenn. Cas. 184, 17 S. W. 152 (1875).

Mr. Cadiente consulted only one nautical expert at the scene of stranding and presumably had the benefit of Captain Hagood's opinion, that the vessel could be saved, before authorizing him to proceed with salvage; yet, relying upon his own inexperienced judgment and without profesional advice, he gave up any attempt to save the vessel and returned to Honolulu. This seems not the action of a prudent, uninsured owner in caring for his property but, rather, callous reliance upon the indemnity of insurance.

Moreover, it is a matter of record that when the appellee tendered her abandonment on June 13th, the sampan had already been rescued and was then under tow to a safe port—and the appellee was so informed.[56] Condition of the vessel both before and after salvage has already been rehearsed, but only brief testimony of Captain Hagood relates directly to circumstances existing at this time. He stated that weather and water were very smooth, and that his inspection of the capsized sampan during the course of towing convinced him that she was in good enough shape to take to Kaunakakai (R. 53). Thus her ill-advised abandonment at that time left appellee in much the same position as that of the assured in *Fireman's Fund Ins. Co. v. Globe Nav. Co.*,[57] wherein the insured vessel had been left in distress at sea on October 13th and towed into port by a salvor on October 15th and notice of her abandonment given to the underwriter on October 16th.

---

[56]*See* part I. B *supra*.

[57]*See* note 27 *supra*, 236 Fed. 618; *cf. Smith v. Universal Ins. Co.*, 6 Wheat. 176 (U.S. 1821); *King v. Delaware Ins. Co.*, 6 Cranch 71 (U.S. 1810); *Wood v. Lincoln & Kennebeck Ins. Co., supra* note 16, 6 Mass. 479, 4 Am. Dec. 163.

This Court held that, irrespective of whether actuality or high probability of loss should control the right to abandon under that policy, no such right existed because:[58]

> The right of the appellee to abandon the vessel, if such right existed, must therefore be determined by the situation of the vessel and the conditions existing on Monday, October 16th, when the written notice of abandonment was given to the agent of appellant. At that time the vessel was afloat and riding safely at anchor in the harbor of Astoria, and its situation and condition had no other high probability than that disclosed by the evidence, which we have already considered and found insufficient to establish a constructive total loss.

So, also, the evidence relating to the condition and situation of MISS PHILIPPINE at the time of her abandonment on June 13, 1949, disclosed no probability other than the actual and estimated expenses shown by appellant.

It is beyond dispute that where an assured offers no evidence as to the amount of damages sustained,[59] or does not show an amount of damage sufficient to justify abandonment under the terms of his insurance policy,[60] he

---

[58] *Id.* at 636.

[59] *Standard Marine Ins. Co. v. Nome Beach L. & T. Co., supra* note 3, 133 Fed. 636; *Soelberg v. Western Assur., supra* note 8, 119 Fed. 23; *McKern v. Corporation of Royal Exch. Assur.*, 85 Ore. 652, 167 Pac. 795 (1917).

[60] *Marcardier v. The Chesapeake Insurance Co., supra* note 1, 8 Cranch 39; *Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11. 2 F. (2d) 137; *Fireman's Fund Ins. Co. v. Globe Nav. Co., supra* note 27, 236 Fed. 618; *Chicago S.S. Lines v. United States Lloyds, supra* note 12, 2 F. (2d) 767, *aff'd* 12 F. (2d) 733; *Levi v. New Orleans Mut. Ins. Ass'n, supra* note 15, 15 Fed. Cas. 418, No. 8,290; *Orrok v. Commonwealth Ins. Co.*, 38 Mass. 456, 32 Am. Dec. 271 (1839); *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 28 Am. Dec. 245 (Mass. 1835).

fails to carry his burden of proving a constructive total loss.

We submit that the appelee could not have failed more completely to prove her case for constructive total loss; and more, that the evidence produced by appellant proved conclusively that at the time of her abandonment the insured vessel could have been recovered and repaired at an expense not exceeding $21,000 or even a moiety of that sum. Recovery for constructive total loss of MISS PHILIPPINE should therefore have been denied.

II. FAILURE OF APPELLEE TO ACT FOR THE DEFENSE, SAFEGUARD AND RECOVERY OF THE INSURED VESSEL BARS HER RECOVERY.

This argument deals with the following assignments of error:

> 22. That the District Court erred in failing to conclude that the policy sued upon required libelant-appellee to labor for the defense, safeguard and recovery of the vessel.
>
> 23. That the District Court erred in failing to find that libelant-appellee failed to make any reasonable, proper and practicable effort to save and conserve the vessel and in failing to conclude that such failure operated to bar her recovery for constructive total loss.

This policy contains the standard provision making it necessary for the assured to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured (R. 7). The purpose of this portion of

the sue-and-labor clause is to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss.[61] It also undertakes to indemnify the assured proportionately for expenses incurred in all such efforts to save and preserve the vessel from loss (R. 7).[62]

It is well stated that in an agreement of this kind, calling for security against loss by any peril insured against, the underwriter contracts to give that security upon the condition that all practicable means be employed on the part of the assured to make such loss as light as possible; and that such contract by its very nature requires a faithful observance of all obligations imposed by it upon either party.[63] Thus where the captain of a sunken river boat constructed an imperfect bulkhead which would not exclude water when it had been pumped out, and without further effort to raise the boat proceeded to wreck her, and the underwriters thereafter demonstrated the feasibility of salvage by raising her in three days, it was held that for want of due care, diligence and skill in efforts to save the vessel, the owner was not entitled to abandon her as a constructive total loss.[64]

Another federal court ruled that after the stranding of an insured vessel, the master and crew were bound to use their best exertions to get her off and save her; and that

---

[61] *White Star S.S. Co. v. North British & Merc. Ins. Co.*, 48 F. Supp. 808, 813 (E.D. Mich. 1943).

[62] *Ibid.*

[63] *Copeland v. Phoenix Ins. Co.*, *supra* note 16, 6 Fed. Cas. No. 3,210, at 508.

[64] *Ibid.*

if they neglected to use all reasonable means and exertions to save her from consequent wreck and destruction, the loss was not within the policy and the assured could not recover as for total loss.[65]

The obligation of an insured owner has been thus defined:[66]

> The rule in such cases is that where the loss is not total or absolute, but only a disabling or stranding of the vessel, it is the duty of the assured to act with the same energy and use such means to save the vessel as a prudent man would do, under the circumstances, if not insured; that is, he is honestly to use all such means as are at his command, under the circumstances, to save the property, and, if he fails to do this, he cannot abandon and throw the entire loss on the (*sic*) assured.

The sue-and-labor clause merely spells out this duty of the assured to employ all reasonable means at his disposal toward saving the vessel, upon pain of losing the benefit of indemnity.[67]

And this Court has indicated the merit of a peremptory direction for the underwriter in the absence of evidence tending to show any reasonable effort on the part of the assured to minimize loss and thereby prevent a total loss.[68]

---

[65] *Howland v. Marine Ins. Co. of Alexandria,* 12 Fed. Cas. 741, No. 6,798 (C.C.D.C. 1824).

[66] *Hundhausen v. U.S. Fire & Marine Ins. Co., supra* note 55, 17 S.W. at 154 (abandonment for constructive total loss not justified).

[67] *Chicago S.S. Lines v. United States Lloyds, supra* note 12, 12 F. (2d) 733.

[68] *See Standard Marine Ins. Co. v. Nome Beach L. & T. Co., supra* note 3, 133 Fed. 636.

Whether this appellee made all reasonable efforts to save MISS PHILIPPINE is not now open to debate, because the record shows that she made absolutely no effort. Her master said he could do nothing because of lack of equipment (R. 73-74), yet he sent away the government's rescue-boat without any attempt to remove the stranded vessel from her perilous position (R. 73); but it should be remarked that appellant's representative, with somewhat more ingenuity, got her off by means of a tractor borrowed from a nearby ranch (R. 130, 148). Appellee's husband and manager, after cursory inspection of the vessel on two successive days, also gave up in despair and returned home without lifting a hand in the protection or recovery of the sampan, meanwhile withdrawing his authorization from the agency which had offered to effect salvage (R. 92-93). In short, appellee did nothing. She chose to leave the vessel pounding on the rocks where, regardless of her perfect structural condition at the time of stranding, the vessel would inevitably become an actual total loss in time. She declined to respond to appellant's demand that salvage be undertaken (R. 111). And a full week after the stranding, when damage to the vessel had increased measurably (R. 130-131), she tendered her abandonment to appellant.[69]

We submit that such conduct on the part of appellee bars her recovery on this policy for a constructive total loss. Reasonable means of saving the vessel were available to her,[70] yet she rejected them all, content to await the vessel's ultimate destruction. It is settled law that notice of abandonment, to be effective, must be given

---

[69]*See* part I. B *supra*.

[70]That appellant's salvage operation was immediately successful is probative evidence of what would be reasonable effort in the circumstances. *Royal Exch. Assur. v. Graham & Morton Transp. Co.*, *supra* note 4, 166 Fed. 32; *The Henry*, 11 Fed. Cas. 1153, No. 6,372 (S.D.N.Y. 1834).

promptly after the assured learns of the loss;[71] that unjustified delay in giving such notice amounts to waiver of the right to abandon and forecloses the possibility of a constructive total loss;[72] and that if the assured postpones abandonment until the vessel has become a technical wreck, such delay is fatal to the right to abandon.[73] To concede to an insured owner the right to lie by and speculate upon future events would, as one federal judge has so aptly put it,[74]

> . . . make the policy an instrument of larceny and not of indemnity.

III. ACTS OF APPELLANT IN RECOVERING, SAVING AND PRESERVING THE INSURED VESSEL DID NOT CONSTITUTE ACCEPTANCE OF HER ABANDONMENT.

The court below held that appellant had by its conduct made itself liable for a constructive total loss, to which ruling appellant assigns the following error:

> 24. That the District Court erred in concluding that on June 14, 1949, respondent-appellant had no right to protect the vessel.
>
> 25. That the District Court erred in failing to conclude that the policy provided that no act of respondent-appellant in recovering, saving or preserving the vessel should be considered as an acceptance of abandonment and that the acts of respondent-appellant in

---

[71] *Duncan v. Koch*, 8 Fed. Cas. 13, No. 4,136 (C.C. P.A. 1801).

[72] *Independent Transp. Co. v. Canton Ins. Office*, 173 Fed. 564 (W.D. Wash. 1909); *Hurton v. Phoenix Ins. Co.*, 12 Fed. Cas. 1047, No. 6,941 (C.C. Pa. 1806).

[73] *Klein v. Globe & Rutgers Fire Ins. Co., supra* note 11, 2 F. (2d) 137; *see Peele v. Merchants' Ins. Co., supra* note 2, 19 Fed. Cas. No. 10,905, at 112.

[74] Judge Clancy in *Jeffcott v. Aetna Ins. Co., supra* note 52, 40 F. Supp. at 411.

procuring the salvage and recovery of the vessel did not constitute a constructive acceptance of abandonment.

26. That the District Court erred in concluding that libellant-appellee was entitled to recover upon the policy for constructive total loss of the vessel.

Appellant does not dispute the facts upon which this ruling (R. 22-23) must necessarily rest, viz.: its agreement to pay not more than $1,500 in salvage charges to King Limited (R. 80-83), executed on June 11th after the appellee had failed to undertake salvage (R. 64, 176); the succesful removal of the vessel from the rocky beach by its agent and the salvor on June 12th (R. 52, 130); its rejection of appellee's tendered abandonment on June 13th, while the vessel was under tow on the high seas, and its refusal thereafter to give the salvor further instructions committing more money to salvage (R. 188-195); its righting of the vessel on June 14th and leaving her tied in a buoyant position at Kaunakakai wharf (R. 150, 153, 160); and its explicit refusal to accept the abandonment of which formal notice was given by appellee's letter dated June 14th (R. 103-105). Appellant's position is simply that, as a matter of law, these facts cannot here be deemed to constitute an acceptance of abandonment.

In the first place, this policy provides in unmistakable terms that no recovery for a constructive total loss may be had thereunder unless expense of recovering and repairing the vessel shall exceed $21,000, a condition precedent which the appellee has not even tried to prove.[75]

[75] *See* part I *supra*.

These terms exclude any application of the technical doctrine of implied acceptance and require that the assured, to recover, must prove her loss to lie within the policy's terms.

Moreover, it is clear that the pleadings raised no issue of acceptance of abandonment. Appellee's libel did not even allege an abandonment, much less an acceptance thereof by appellant (R. 2-4). Recovery must be had, if at all, on the facts alleged in the libel; and the decree must conform to and be supported by the pleadings.[76] Hence the court below erred in deciding this case upon a distinct theory not pleaded,[77] quite apart from its erroneous construction of the evidence and disregard of the policy itself, and so much of the decree rendered on that ground is invalid.[78]

Even if constructive acceptance of abandonment could be deemed a proper issue in this case, such a result is effectively precluded by the following provisions of the policy's sue-and-labor clauses:

> . . . nor shall the acts of the Assured or Insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment (R. 7);

---

[76] *Webster Eisenlohr v. Kalodner*, 145 F. (2d) 316 (C.C.A. 3d 1944); *Sylvan Beach v. Koch*, 140 F. (2d) 852 (C.C.A. 8th 1944); *cf. Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912); *Barnes v. Chicago, M. & S. P. Ry.*, 122 U.S. 1 (1887); *Drybrough v. Ware*, 111 F. (2d) 548 (C.C.A. 6th 1940); *Deitrick v. Standard Surety & Casualty Co.*, 90 F. (2d) 862 (C.C.A. 1st 1937), *aff'd* 303 U.S. 471 (1938); *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408 (C.C.A. 9th 1900), *rev'd on other grounds* 184 U.S. 695 (1902).

[77] *Goodrich Transit Co. v. Chicago*, 4 F. (2d) 636 (C.C.A. 7th 1925).

[78] *Reynolds v. Stockton*, 140 U.S. 254 (1890).

> And it is expressly declared and agreed that no act of the Assurers or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment. (R. 8.)

Clauses of this nature have been generally adopted in marine policies in consequence of Mr. Justice Story's comprehensive dictum[79] that insurers' acts of taking exclusive possession of an insured vessel to repair her for the account of her owners, without the owners' consent, constituted in law an acceptance of her tendered abandonment.[80]

Under such clauses the acts of underwriters in saving insured vessels have been held to imply acceptance of abandonment *only* when coupled with other acts unauthorized by the policies in question, notably, unjustified withholding of possession of the vessel from the assured,[81] and failure of the underwriter to make complete reparations and return the vessel within a reasonable time after having undertaken repairs pursuant to a right expressly granted by the policy.[82] *Copelin v. Insurance Co.*,[83] is probably the leading case of this type. It involved a policy which, in addition to the sue-and-labor clause, al-

---

[79] *See Peele v. Merchants' Ins. Co., supra* note 2, 19 Fed. Cas. No. 10,905, at 118-119.

[80] *See Northwestern Transp. Co. v. Continental Ins. Co.*, 24 Fed. 171, 177 (C.C.E.D. Mich. 1885).

[81] *Kahmann & McMurry v. Aetna Ins. Co.*, 242 Fed. 20 (C.C.A. 5th 1917).

[82] *E.g., Hume v. Frenz*, 150 Fed. 502 (C.C.A. 9th 1907); *Northwestern Transp. Co. v. Continental Ins. Co., supra* note 80; *Young v. Union Ins. Co.*, 24 Fed. 279 (N.D. Ill. 1885); *cf. Reynolds v. Ocean Ins. Co., supra* note 16, 22 Pick. 191, 33 Am. Dec. 727.

[83] 9 Wallace 461 (U.S. 1869).

lowed the underwriter to interpose and cause the vessel to be repaired if the assured failed to do so; and there the underwriter had tendered the salvaged vessel, with repairs admittedly insufficient, more than six months after her sinking. Mr. Justice Strong reasoned that the policy authorized the underwriter to take possession only for the purpose of complete repair; that taking possession for only partial repair or retaining possession for an unreasonable time were unauthorized by the policy and hence not protected by the sue-and-labor clause; and that such unauthorized acts therefore constituted substantial recognition of the owner's abandonment.

It must be observed that this policy contains no such provision authorizing appellant to repair MISS PHILIPPINE,[84] and that appellant neither undertook to repair her nor withheld possession thereof from the appellee at any time. The rationale of those decisions which turn on the underwriter's failure to make adequate and timely repairs thus has no application here. Even those cases recognize that the object of the sue-and-labor clause is to prevent the mere act of taking possession and rescuing the property from being treated as, *ipso facto,* an acceptance of abandonment.[85]

Abundant authority supports appellant's contention that mere salvation of the distressed vessel cannot be taken as an acceptance of abandonment. Thus, where abandonment had been tendered and refused, and thereafter the under-

---

[84]Such a clause has significance solely in cases of partial loss and would be surplusage in a policy covering total loss only.

[85]*See Northwestern Transp. Co. v. Continental Ins. Co., supra* note 80, 24 Fed. at 178.

writer's agent cooperated actively with the master in getting the damaged vessel into port for repairs, this Court held that the agent had not performed any act beyond the powers conferred by the sue-and-labor clause which might evidence acceptance of abandonment.[86] A like conclusion was reached where a sunken vessel was raised by a wrecking company, then libeled for salvage and sold.[87] And where the underwriter dispatched aid to rescue a stranded steamer and actually towed her to a safe port, but did not order her repaired, the Supreme Court ruled that such conduct by the underwriter did not establish a constructive acceptance of abandonment in the face of the policy's sue-and-labor clause.[88]

Perhaps the most definite statement of the clauses's effect was given by the Supreme Court in *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*:[89]

> The sue and labor clause expressly provided that acts of the insurer in recovering, saving and preserving the property insured, in case of disaster, were not to be considered an acceptance of abandonment. Whether regarded as embodying a common-law principle, or as new in itself, the clause must receive a liberal application, for the public interest requires both the insured and insurer to labor for the preservation of the property. And to that end provision is made that this may be done without prejudice.

Accordingly the Court held that acts of a cargo underwriter, in paying for salvage of the cargo and trans-

---

[86] *Soelberg v. Western Assur. Co., supra* note 8, 119 Fed. 23.
[87] *Levi v. New Orleans Mut. Ins. Assn., supra* note 15, 15 Fed. Cas. 418, No. 8,290.
[88] *Richlieu Nav. Co. v. Boston Ins. Co.*, 136 U.S. 408 (1890).
[89] *See* note 4 *supra*, 179 U.S. at 18.

shipping it to destination despite the owner's offer of abandonment, could not operate as a constructive acceptance. The underwriter had refused to accept abandonment, there was no ambiguity in its attitude, and what it did was no more than it had the right to do without incurring a liability expressly disavowed.

In another case, an insured steamer sank at her dock, and her owner thereupon notified the underwriters of abandonment. The latter promptly arranged for salvage, however, and had the vessel raised within a week after her sinking. Noting that the policies in question conferred upon the underwriters no right to make repairs and that they never took possession for that purpose, the court held that they could not be punished for trying to minimize the damage, saying with respect to the sue-and-labor clause:[90]

> This provision is in the public interest. It leaves both insurer and insured free to act for the safety of the vessel without prejudice to their respective rights under the policy. . . . The acts which are protected are those reasonably tending toward the recovery of or the safety of the vessel. In my opinion the mere raising of the Clyde did not constitute an acceptance of abandonment.

In affirming the foregoing decision, the Circuit Court of Appeals observed that *Copelin v. Insurance Co.*,[91] involving both inadequate repairs and unreasonable retention of

---

[90] *Chicago S.S. Lines v. United States Lloyds, supra* note 12, 2 F. (2d) at 769.

[91] *See* note 83 *supra*, 9 Wallace 461.

possession by the underwriter, was a very different case and stated:[92]

> In dealing with wrecks or lesser casualties to vessels, it is of the utmost importance, not only to the insured, but to the insurer, that immediate steps be taken, not only for the protection of the vessel and cargo, but also for the ascertainment of the exact condition and damage to each. By the former, the property is conserved, and by the latter the facts are ascertained and preserved for the determination of the rights of the parties. It is the duty and the right of the insured to save and conserve the property, and it is the right, if, indeed, not the duty, of the insurer to do the same.

Even more recently it has been held that an underwriter's acts of salvaging a submerged yacht and replacing her, unrepaired, at her berth, after having refused to accept abandonment, were protected by the sue-and-labor clause and did not give the owner ground for recovery on the theory of implied acceptance of abandonment.[93]

So, in this case, appellant ran no risk that its acts of contracting for salvage of the vessel, getting her off the strand and into a safe harbor, and righting her, would be deemed an acceptance of abandonment. The court's inference (R. 22) that appellant had no consent of the salvor to protect the vessel at Kaunakakai is just as incomprehensible as its conclusion (R. 22, 23) that appellant accepted the abandonment by releasing (not abandoning)

---

[92]12 F. (2d) at 737.

[93]*Jeffcott v. Aetna Ins. Co.*, 32 F. Supp. 409 (S.D.N.Y. 1940) (sustaining exceptions to libel).

the vessel to appellee after she gave notice of abandonment. Appellant was merely exercising a right conferred upon it by express terms of the policy, a right which inured to the benefit of everyone concerned with the property. And its acts of saving the vessel were, in point of time, completed before the appellee even tendered abandonment. Nowhere is it suggested that acts of the underwriter prior to abandonment could possibly constitute an acceptance of abandonment.[94] Statement of such a proposition carries its own refutation.

To summarize: the doctrine of constructive acceptance of abandonment has no application under a policy which permits recovery only upon proof of specified damage; it was not invoked by the pleading in this case; it cannot apply to acts of the underwriter which are expressly sanctioned by the policy's sue-and-labor clauses; and it cannot in any event operate until an abandonment has been tendered by the assured. All of these defenses exist here, and each prevents any recovery against appellant on the theory of constructive acceptance of appellee's abandonment of MISS PHILIPPINE.

---

[94] *Contra: Richlieu Nav. Co. v. Boston Ins. Co., supra* note 88.

CONCLUSION.

For the foregoing reasons, we ask that the decree appealed from be reversed and this cause remanded to the District Court for the District of Hawaii with directions to enter decree for the appellant.

Dated, Honolulu, Hawaii,
September 1, 1950.

Respectfully submitted,
THOMAS M. WADDOUPS,
ROBERT E. BROWN,
Proctors for Appellant.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.